

Buffalo Environmental Law Journal

Volume 22
Number 1 *Issue 1-2*

Article 1

1-1-2015

It's Not Just the Effort That Counts: Conservation Endangerment for At-Risk Species

Robert T. Caccese

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Robert T. Caccese, *It's Not Just the Effort That Counts: Conservation Endangerment for At-Risk Species*, 22 Buff. Env'tl. L.J. 1 (2014-2015).

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IT'S NOT JUST THE EFFORT THAT COUNTS: CONSERVATION ENDANGERMENT FOR AT-RISK SPECIES

Robert T. Caccese *

The listing determination factors nestled within Section 4 of the Endangered Species Act can be best described as the controversial heart and soul of the statute. Federal courts, charged with reviewing listing determinations, need specific criteria to provide better consistency and clarity for the arbitrary and capricious judicial review standard. In its current state, the standard has not been stated with any particularity, leaving adequacy to be based upon case-specific analysis by various federal judges regarding listing decisions of the U.S. Fish and Wildlife Service. Most crucial are contexts pertaining to conservation effort reliance. Federal agencies' increased reliance on agreements and efforts to avoid listing at-risk species has accelerated a trend delegitimizing the Endangered Species Act. Furthermore, conflicts of "warranted, but precluded" listing decisions, political interference, and deference to state management plans have clouded the waters for courts deciding whether an agency has strayed from obligations to ensure species' survival. Considering the stark reality of increased energy exploration in remote parts of the country, a clear and determinable strategy for effort reliance is a necessity for courts when tasked with a listing decision review. Millions of dollars have been spent litigating the validity of critical habitat plans, as well as exclusions from critical habitat. Dependable criteria will allow courts across a national spectrum to define what "arbitrary and capricious" truly means, preserve the legitimacy of the Act, and steer funds toward practicable habitat management, rather than fruitless litigation. Time is money. Overdependence on conservation practices shouldn't result in the deterioration of America's wildlife resources.

* J.D. 2015, The Pennsylvania State University-The Dickinson School of Law. Special thanks to Professor Jamison E. Colburn for his advisory role and feedback throughout the piece.

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INTRODUCTION

It is no secret to lawyers, biologists, and politicians that the Endangered Species Act¹ (“ESA” or “Act”) is one of the most powerful laws ever enacted by Congress. The overwhelming control the statute possesses over land use restrictions, take prohibitions, and critical habitat designations is a thing of beauty for most environmentalists and wildlife advocates. The deference the law provides to the United States Fish and Wildlife Service² (“FWS”) and National Marine Fisheries Service³ (“NMFS”), with respect to how critical habitat is managed and whether species warrant listing, leads many to think any flora or fauna threatened with extinction will be rescued by the sweeping parameters of the Act.

However, too much deference to and reliance on the actions of FWS have essentially diminished the legitimacy of the Act through increased use of conservation agreements, questionable exclusions from critical habitat, and “warranted, but precluded”

¹ Endangered Species Act, 16 U.S.C. §§ 1531-44 (2015).

² FWS is a federal agency located within the Department of Interior, and it is tasked with the mission “to conserve, protect, and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people.” *About the U.S. Fish and Wildlife Service*, U.S. FISH AND WILDLIFE SERVICE, (last visited Apr. 22, 2015), available at http://www.fws.gov/help/about_us.html. The agency is responsible for enforcing federal wildlife laws, protecting endangered species, restoring significant fisheries, managing migratory birds, and helping foreign governments with their respective conservation efforts. *Id.* Additionally, the Agency manages the 150 million-acre national wildlife refuge system of more than 551 national wildlife refuges and thousands of small wetlands and other special management areas. *Id.* Under the fisheries program, FWS operates 70 national fish hatcheries, 65 fishery resource offices, and 86 ecological services field stations. *Id.* The Service is headquartered in Washington, D.C., and it has regional and field offices across the country. *Id.*

³ The NMFS is a division of the Department of Commerce responsible for the stewardship of the nation’s living marine resources and their habitat. *About Us*, NOAA FISHERIES (last visited Apr. 22, 2015), available at <http://www.nmfs.noaa.gov/aboutus/aboutus.html>. Under the ESA, NFMS seeks to recover protected marine species (i.e. whales, turtles), while fostering economic and recreational opportunities. *See id.* The Service works to promote sustainable fisheries and prevent potential economic loss associated with overfishing, declining species and degraded habitats. *Id.*

designations for species that clearly deserve listing as endangered or threatened. The origin of this problem may be traced to the listing factors of Section 4 of the Act. Fact intensive inquiries consume a large proportion of agency resources and time. Mandating use of the best available science in listing contexts deepens the inquiry, and complicates the development of valid listing decisions, where sub-par conservation efforts have shown minimal success.

When FWS listing decisions seem contrary to established duties, a federal court may review the Agency's action and deem it arbitrary and capricious.⁴ Nevertheless, something as simple as a review standard for courts has presented immense challenges and obstacles in shaping future agency action. The standard lacks criteria, has not been stated with any particularity, and is essentially: *you know it when you see it*. Furthermore, almost every federal court across the country has used different factors in determining whether listing actions by the agency are unreasonable. FWS has created policies encompassing the use of conservation efforts for this very instance, yet courts nationwide have used these policies and conservation practices with little consistency.

Blended with this lacking consistency, threats of political judgments in a supposed science context and the deferment of FWS to lower-tier management plans brings overreliance on conservation practices to full light. What has become the threshold mark defining "success" of a conservation effort to avoid listing a species? This question is notably exemplified by the continuing scuffle involving sage grouse and the expansion of the energy industry.

Definitive criteria are needed to adequately explain how and when conservation practice reliance becomes arbitrary and capricious for agencies. Developing judicial consistency and allocating agency funds away from litigation is an initial step to reverse the current trend of sup-par conservation reliance. Furthermore, direct links between the success of efforts and the alleviation of threats is fundamental, if not vital. Review standard criteria for effort reliance are just the first step in resurrecting and reviving the ESA.

⁴ See 5 U.S.C. § 706(2)(A) (2012).

I. PURPOSES, POLICY, AND THE CONTROVERSY SURROUNDING SECTION 4

Section 4 of the ESA provides the mechanics for listing at-risk species to the endangered species list (“ESL”) or threatened species list (“TSL”).⁵ The balancing of listing factors, joined with critical habitat designations, prove Section 4 to be one of the most influential but controversial segments of the Act. Notably, Section 4 was drafted broadly so the “Secretary could declare species endangered or threatened for any legitimate reason.”⁶ Major amendments were made in 1982 by a very different Congress, possessing a dissimilar mindset from the legislature in 1973. Through the amendment process and following years, Section 4 has become the most written of and talked about piece of the ESA; and for good reason.

A Background of Section 4 and How Congress Developed Its Purpose

Prior to the enactment of the ESA, two laws existed concerning endangered species conservation: the Endangered Species Preservation Act of 1966⁷ and Endangered Species Conservation Act of 1969.⁸ Both took steps to reduce potential harm to native wildlife species. “Under the two laws, the FWS reviewed a specie’s status by consulting with affected states and considering factors based habitat destruction and disease.”⁹ Formal listing factors arrived with the 1973 Act and limited the scope of how listing decisions were to be considered. The factors that set the ESA into motion are to be balanced by the Secretary of Interior and Secretary of Commerce. Sole consideration for an at-risk species includes “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or

⁵ *See generally* 5 U.S.C. § 1533.

⁶ H.R. Rep. No. 93-412, at 150 (1973).

⁷ Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (repealed 1973).

⁸ Pub. L. No. 91-135, 83 Stat. 275 (1969).

⁹ MICHAEL J. BEAN ET AL., *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 195 (3d ed. 1997).

educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”¹⁰

In 1978, FWS created regulations regarding critical habitat designation (“CHD”). The Agency expressly forbade inclusion of “socioeconomic factors unrelated to the biological needs of a listed species” when designating critical habitat.¹¹ After *Tennessee Valley Authority v. Hill*,¹² Congress immediately amended the ESA for critical habitat designation to mandatorily include economic impacts in the analysis by the Secretary.¹³

By 1982, major amendments occurred and revised applicable procedures for CHD and listing. The amendments required species’ status determinations to be made solely on the basis of biological and trade information, without economic consideration.¹⁴ Furthermore, Congress permitted listing a species without concurrent CHD if critical habitat was not determinable.¹⁵

B. Major Issues Created by the Listing Factors

The Section 4(a) factors and Section 4(b) CHD balancing test have created a number of issues surrounding the listing process. First, the criteria tend to be very fact intensive. FWS is underfunded and personnel are already stretched to the limits. Requiring more information about a species to make a decision whether to list can get expensive quickly. Second, the criteria can be excessively scientific and dense to people lacking a technical background. Very rarely do appointed Secretaries of FWS and NMFS possess degrees in wildlife management, conservation, or fisheries science. As a result, the Federal Code of Regulations, part 424, contains FWS-

¹⁰ 16 U.S.C. § 1533(a)(1)(A)-(E).

¹¹ 43 Fed.Reg. 869, 872 (Jan. 4, 1978).

¹² *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (holding ESA prohibited construction and operation of a dam because the activities would have threatened an endangered species, the snail darter, and its critical habitat).

¹³ See Pub. L. No. 95-632, 92 Stat. 3751 (1978).

¹⁴ 16 U.S.C. § 1533(b)(1)(A).

¹⁵ See 16 U.S.C. § 1533(b)(6).

adopted regulations for listing species under Section 4.¹⁶ This allows the agency to administer the ESA as intended, containing simpler language than the sometimes rigid and complicated statutory text.

Third, the factors themselves are notably broad. The nature of the criteria allows delay of species listing to become a regular occurrence based on political pressure and carefully chosen “best available science.” Fourth and most importantly, is the relationship between conservation efforts and the “best science” requirement of Section 4(b)(1)(A). Mandating use of the best available science coupled with consideration of efforts being made “by States, political subdivisions, or foreign nations whether by predator control, protection of habitat, or other conservation practices” has potential to cause confusion in listing analyses.¹⁷ An agency must look into the future and determine what the effect of the effort will be, absent any data concerning the conservation practice and whether the practice will work. In considering “other conservation practices” as mandated by Section 4(b)(1)(A), FWS must ask whether efforts are likely to work better than listing. An important aspect of this relationship is how much energy an agency must put into understanding potential success of a conservation practice compared with simply listing.

II. ARBITRARY AND CAPRICIOUS? COURT APPLICATION OF THE STANDARD IN LISTINGS

Review based upon the arbitrary and capricious standard has accounted for increased reliance on conservation agreements and practices by FWS. Furthermore, courts have been exposed to increased “Warranted, but Precluded” (WBP) designations by the agency in recent times.¹⁸

¹⁶ See 50 C.F.R. § 424.11 (1984).

¹⁷ See 16 U.S.C. §1533(b)(1)(A). A crucial distinction of this relationship hinges on the notion that “best science available” implies some past data or study the Secretary can refer to in a listing decision, whereas reliance upon conservation practices that have an impending effect or have yet proven successful. See *id.*

¹⁸ See *id.* at §1533(b)(3)(B)(iii) (requiring Service to publish a description in the Federal Register of the reasons and data upon which each “warranted, but precluded” decision is based).

A. The Policies Surrounding the Use of Conservation Efforts by USFWS

Section 4(b)(1) of the ESA mandates that in making listing determinations, the Secretary *shall* take into account “those efforts . . . made by any State . . . to protect such species, whether by predator control, protection of habitat and food supply, or *other conservation practices*”¹⁹ As a result, FWS enacted a formal policy in 2003 governing the use of conservation practices and efforts in listing decisions.²⁰ Included for consideration are practices by the federal government, state and local agencies, tribal governments, businesses, and individual citizens.²¹

Two main criteria constitute a majority of the policy: (1) the certainty with which conservation efforts will be implemented; and (2) the certainty that those efforts will be effective.²² Within each, FWS identifies factors to help determine whether the criteria are satisfied.²³ These “factors” are more appropriately termed “questions” and realistically do not help in answering whether efforts will be effective. Significantly, FWS has admitted efforts could take several years to demonstrate positive results.²⁴ Moreover, the policy

¹⁹ *Id.* at § 1533(b)(1)(A).

²⁰ See Notice, Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003) [hereinafter “PECE”].

²¹ *Id.* (identifying criteria to use in determining whether formalized efforts that have yet to be implemented or show success contribute to not list a species under the Act).

²² See *id.* at 15,101.

²³ *Id.* (identifying the following questions pertaining to whether efforts will be implemented are: Is there a high level of certainty that the resources necessary to carry out the conservation effort are available? Do the parties to the conservation effort have the authority to carry it out? Are the regulatory or procedural mechanisms in place to carry out efforts? And, is there a schedule for completing and evaluating the efforts? Questions pertaining to the efforts’ effectiveness include: Does the effort describe the nature and extent of the threats to the species to be addressed and how these threats are reduced by the conservation effort? Does the effort establish specific conservation objectives? Does the effort identify the appropriate steps to reduce threats to the species? And does the effort include quantifiable performance measures to monitor for both compliance and effectiveness?).

²⁴ See *id.* at 15,102 (“We agree it could take several years for some conservation efforts to demonstrate results. However, the PECE criteria provide the framework

does not set standards for how much conservation is needed to make listing unnecessary.²⁵ FWS has indicated the Agency does not believe it necessary for parties to demonstrate a high level of certainty that conservation efforts will be implemented by an individual based on prior actions.²⁶ With the scarcity of resources and high listing costs, it is easy to see why FWS prefers conservation efforts in a pre-listing context.²⁷ After the Agency deems the efforts satisfactory, a decision to not list the at-risk species often results.²⁸

In addition to the PECE, FWS has enacted a policy for employing candidate conservation agreements with assurances ("CCAA") between private individuals and the agency.²⁹ The policy is designed to give property owners assurances to remove concerns and encourage implementation of conservation measures for a certain species.³⁰ An important aspect of the policy is an assurance from the agency that no additional conservation measures, as well as water and land restrictions, will be required once the agreement is finalized. Even if target species attempting to be conserved end up on the ESA in the future, additional restrictions will not be implemented.³¹

for us to evaluate the likely effectiveness of such formalized conservation efforts").

²⁵ *See id.*

²⁶ *Id.* at 15,106. Essentially, this boils down to the agency taking the "honor system" route relying on hopes that efforts will be implemented for target species. *See id.*

²⁷ Kirsten Uchitel, *PECE and Cooperative Conservation: Innovation or Subversion under the Endangered Species Act?*, 26 J. LAND RESOURCES & ENVTL. L. 233, 239 (2006) (discussing the increased use of conservation efforts and practices in listing decisions by FWS).

²⁸ *See* PECE, *supra* note 20, at 15,106.

²⁹ *See* Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999) ("[The] policy offers assurances as an incentive for non-Federal property owners to implement conservation measures for species that are proposed for listing under the Act as threatened or endangered, species that are candidates for listing, and species that are likely to become candidates or proposed in the near future.").

³⁰ *See id.* at 32, 727 (stating CCAs are intended to preclude or remove any need to list a covered species).

³¹ *See id.* at 32,728.

Arguably, this policy impedes any consideration or use of adaptive management.³² In today's world of continually changing landscapes, adaptive management is a model for all wildlife, not just at-risk species. CCAA's certainly may reduce chances of helping at-risk species if conservation measures cannot be adapted for future habitat and ecosystem changes.

Another policy matter affecting FWS's conservation efforts involves FWS's Listing Priority Guidelines ("LPG"). LPGs are guidance measures enacted by FWS to govern the potential listing process for species subject to "warranted, but precluded" designations.³³ Within these guidelines are two main "categories" of analysis that lead to an assigned listing priority number ("LPN") for a particular species: (1) the threat to the species; and (2) the taxonomic status of the species.³⁴ Of the two categories, the "threat" prong seems to carry the most impact from existing conservation efforts. Admittedly, the Service states, "[priority] assessments are subjective to some degree, and individual species may not be comparable in terms of all considerations."³⁵ The agency developed the priority system as guidance rather than formal regulation,

³² *Adaptive Management*, UNITED STATE GEOLOGICAL SERVICE (May 01, 2013), http://www.usgs.gov/ecosystems/wildlife/adaptive_management.html (stating adaptive management is a structured approach to resource management that allows collaboration between managers and scientists to improve resource management over time by learning from management outcomes.").

³³ See Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098 (September 21, 1983) [hereinafter Listing and Priority Guidelines].

³⁴ See *id.* at 43,103. Threat to a species is measured in magnitude and immediacy. *Id.* Magnitude is further broken down into "high" or "moderate to low." The immediacy prong of the category leaves the agency to determine whether a threat is imminent or non-imminent. See *id.* at 43,099. Additionally, the "immediacy" analysis is designed to assure priority for species facing actual, identifiable threats over species facing only potential or unknown threats. *Id.* at 43,103. Finally, the taxonomy prong of the analysis lists three possible designations for a species' taxon status: monotypic genus, species, and subspecies. See *id.* at 43,103-04. Monotypic genera receive highest listing priority and subspecies receive the lowest). *Id.*

³⁵ *Id.*

resulting in conservation efforts blending into threat analysis, as the guidelines tend to be vague and flexible.

Conservation practices have potential to cloud WBP designation in various ways. First, in assessing a threat to a species, FWS has discretion to determine whether an effort diminishes a particular threat. If the Agency deems so, a lower magnitude of threat, and subsequently lower LPN, may be given in the event the Agency believes the effort is working. In reality, the conservation effort may still be unproven or not working in ways the Agency believes, due to a lack of data. Furthermore, species in dire need of high listing priority could be compromised with notions that an effort will alleviate a threat to a considerable degree.

Second, judicial review is limited to WBP designations that have potential to be deemed arbitrary and capricious. Because LPG's are guidance and discretionary, with regard to what information is used by FWS, judicial review is difficult. Courts must base a decision, that the agency arbitrarily designates a species as WBP, on concrete evidence. Conservation efforts and practices have the ability to "hide in the shadows" away from direct examination because of the discretionary nature of the LPG policy. As FWS makes findings regarding the threat magnitude and immediacy, analysis of conservation efforts will certainly play a primary role in how the Agency proceeds through WBP designations.

Third, balancing hardship by the Agency is a key component that lies in the backdrop of WBP designations. Species that receive a great deal of attention, science, and controversy will require greater devotion and resources by the Agency if listed. Wildlife coming to mind in this context include lynx, grizzly bears, wolves, and spotted owls. FWS can possibly reach negative listing decisions or designate lower LPN's by employing conservation effort reliance toward these species without expressly saying so in the public realm. Effort reliance possesses an ability to buy the Agency time by listing species as Candidate Species until a court may order the Service to list them as endangered or threatened.

B. Courts' Treatment of Agreements and Efforts in Listing Determination Cases

Federal courts across the country have faced the chore of incorporating conservation efforts in reviewing listing decisions by FWS. One of the many questions associated with this task is how much influence courts should put on conservation efforts relied upon by the agency. Essentially, conservation reliance has formed into a “sixth listing factor” under Section 4(a)(1). Though determinations are to be made on the “best available science,” and conservation practice reliance is limited to Section 4(b);³⁶ many courts are caught in a position examining agency use and reliance in listing contexts. Very little consistency exists among the circuits, let alone within individual circuits, on this issue.

The emergence of PECE policy in listing decisions first appeared in *Western Watersheds Project v. Foss*, which involved the potential listing of Slickspot peppergrass as endangered.³⁷ The U.S. District Court for the District of Idaho found it unnecessary to directly address the issue of conservation efforts because FWS action had been found arbitrary and capricious on other grounds; however, the court did surmise that formalized conservation efforts should be implemented before a species stands near the precipice of extinction.³⁸ In *Center for Native Ecosystems v. United States Fish and Wildlife Service*, FWS’s refusal to list a native wildflower under the ESA was deemed arbitrary and capricious due to the Agency’s reliance on future conservation efforts.³⁹ The court held FWS’s failure to consider combined impacts of energy development,

³⁶ See generally 16 U.S.C. § 1533(b)(1)(A).

³⁷ *W. Watersheds Project v. Foss*, No. CV 04–168–MHW, 2005 WL 2002473 (D. Idaho Aug. 19, 2005).

³⁸ *Id.* at *18.

³⁹ *Ctr. for Native Ecosystems v. U.S. Fish and Wildlife Serv.*, 795 F. Supp. 2d 1199, 1209 (D. Colo. 2011) (“Plaintiffs’ final challenge is to the FWS’s reliance on conservation measures in the Final Rule to mitigate or avoid threats to the species. As noted, one of the listing factors to be considered is the adequacy of “existing regulatory mechanisms.” 16 U.S.C. § 1533(a)(1)(D). This plain language precludes the use of future conservation efforts in making the listing determination).

livestock grazing, and *reliance upon undetermined conservation measures in leases was irrational*.⁴⁰

Greater Yellowstone Coalition, Inc. v. Servheen encompassed FWS's reliance on a conservation strategy to delist grizzly bears and how the strategy would adequately monitor bear populations.⁴¹ The District of Montana ruled the Service action as arbitrary and capricious in reliance upon the strategy because "the only standard" set forth was a goal of maintaining above 500 bears and associated mortality limits for grizzly bears.⁴² No additional standards delineating how to maintain a population of 500 bears or ensuring mortality did not exceed specified levels were present.⁴³ Likewise, no method to enforce monitoring protocols set forth in the conservation strategy existed, and if monitoring was enforceable, it did nothing to protect the grizzly bear population.⁴⁴

Western Watersheds Project v. U.S. Fish and Wildlife Service presented a similar situation with regard to conservation efforts in natural gas development.⁴⁵ In *Western Watersheds Project*, FWS acknowledged a lack of lease stipulations to protect sage grouse or practices adopted by BLM to improve grouse habitat.⁴⁶ A decision not to list the grouse ensued, based upon the assumption conservation efforts would be effective. The court concluded: "The FWS's failure to coherently consider the adequacy of existing regulatory mechanisms renders its decision arbitrary and capricious."⁴⁷

Similarly, in *Federation of Fly Fishers v. Daley*, the court held NMFS acted arbitrarily and capriciously in deciding to not list a unit of steelhead on the basis of a conservation plan yet to be implemented or proven effective.⁴⁸ Further, in *Oregon Natural*

⁴⁰ *Id.* at 1209–10.

⁴¹ *Greater Yellowstone Coal., Inc. v. Servheen*, 672 F. Supp. 2d 1105 (D. Mont. 2009).

⁴² *Id.* at 1120.

⁴³ *Id.* at 1115.

⁴⁴ *See id.*

⁴⁵ *W. Watersheds Project v. U.S. Fish and Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007).

⁴⁶ *Id.* at 1187.

⁴⁷ *Id.* at 1188–89.

⁴⁸ *Fed'n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1169 (N.D. Cal. 2000)

Resources Council v. Daley, the court determined the text of Section 4 indicates “voluntary or future conservation efforts by a state should be given no weight in the listing decision.”⁴⁹ More recently, in *Center for Biological Diversity v. U.S. Bureau of Land Management*, the Ninth Circuit held FWS’s reliance on beneficial effects of conservation action plan measures as “cumulative effects” to reach its “no jeopardy” and “no adverse modification” determinations was arbitrary and capricious.⁵⁰

By contrast, in *Tucson Herpetological Society v. Salazar*, the Ninth Circuit ruled reliance on a conservation agreement to avoid listing the flat-tailed horned lizard was reasonable.⁵¹ Even though the agreement had not been fully implemented by the time of the court decision, certain benefits were found to have been achieved which helped preserve the lizard’s habitat, such as decreased off-road vehicle use and limited pesticide application.⁵² Similarly, in *Defenders of Wildlife v. Babbitt*, California District Court judges held a state level conservation agreement could be relied upon by FWS as long as the agreement was implemented at the time of a listing decision, and the agreement was not the primary means for choosing not to list the lizard.⁵³ “As long as states attempt to make continuing conservation efforts, they may be considered by the FWS;” therefore, reliance was rational.⁵⁴

(“The Court finds that most of the plans were in fact proposals for future action. NMFS could not rely on future actions in making its determination. The remaining plans involved voluntary measures toward conservation. Although it was appropriate for NMFS to consider such measures, it was arbitrary and capricious for NMFS to rely, in effect, exclusively on voluntary, actions despite its finding in the Proposed Rule that past state conservation efforts were inadequate”).

⁴⁹ *Oregon Natural Res. Def. Council*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998); *see also* *W. Watersheds Project*, 535 F. Supp. 2d at 1187; *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997); *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23 (D. D.C. 1996).

⁵⁰ *Ctr. for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1109-10 (9th Cir. 2012).

⁵¹ *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870 (9th Cir. 2009).

⁵² *Id.* at 880–81.

⁵³ *Defenders of Wildlife v. Babbitt*, 1999 WL 33537981, at *8 (S.D. Cal. 1999), *rev’d sub nom.* *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

⁵⁴ *Id.*

As illustrated, cases from the Ninth Circuit demonstrate the inconsistency and unpredictability conservation agreements provide in review of listing determinations. Species needing legitimate protection are at the mercy of how presiding judges interpret the value of conservation efforts and practices at the time of listing.

Judicial analysis of an agency decision is limited to whether the agency relied upon the “best scientific and commercial data available” at the time the agency made a listing determination.⁵⁵ Incorporating conservation efforts is a tricky balancing act because courts cannot view reliance on an effort as a sole reason to not list, as this is limited by the Section 4(a)(1) factors.⁵⁶ However, Section 4(b) mandates the Secretary shall take into account conservation practices as a basis for determinations.⁵⁷ The biggest question remaining for a judge reviewing a listing is exactly where conservation efforts fit into the review puzzle and when does reliance become arbitrary and capricious?

C. “Warranted, but Precluded” Presents a Conflict of Interest for the Agency

Deciding whether a species merits listing to the ESA can be a long and burdensome process, mainly because wildlife and plants across the world are susceptible to threats all the time. WBD designations were added to the ESA through amendments by the 1982 Congress.⁵⁸ These status designations mean FWS has determined a species should be listed based on available science, but other species require higher priority for protection at the same time.⁵⁹ This section was added to instill time frames on species decisions. In practice, such status reviews have often continued indefinitely, sometimes

⁵⁵ 16 U.S.C. § 1533(b)(1)(A).

⁵⁶ *See id.* § 1533(a)(1).

⁵⁷ *See id.* § 1533(b)(1)(A).

⁵⁸ K. Mollie Smith, *Abuse of the Warranted but Precluded Designation: A Real or Imagined Purgatory?*, 19 SOUTHEASTERN ENVTL. L.J. 119, 125 (2010).

⁵⁹ *See* 16 U.S.C. § 1533(b)(3)(B)(iii) (For a species to attain this type of designation, other species must warrant higher listing priority and “expeditious progress is being made to add qualified species to the ESL and to remove from such list species for which the protections of the ESA are no longer necessary”).

for years.⁶⁰ Judicial review exists for WBP designations and FWS is required to justify why a listing is precluded for a particular species.⁶¹ Under review, courts must differentiate between bona fide designations and time-delaying antics of the Agency.

WBP designations present a conflict of interest for FWS. The Agency is responsible for conservation and preservation of wildlife, yet the Agency's WBP designations jeopardize the survival of wildlife entrusted to its protection. In November 2013, FWS released the Candidate Notice of Review, which named 146 species of plants and animals as candidate species for listing.⁶² The sage grouse is an example of a species whose habitat has been compromised significantly, and still possesses a WBP designation.⁶³ However, a settlement between the Center for Biological Diversity and FWS resulted in a listing decision deadline for the grouse and its subspecies by the end of fiscal year 2015.⁶⁴

Nevertheless, allegations of purposeful delay by choosing WBP designations, listing priority guidance abuse, and neglecting to monitor species on the WBP list are commonplace in today's conservation atmosphere.⁶⁵ FWS finds itself between a rock and hard place choosing these type of designations: trying to fulfill the duty to protect wildlife, while navigating the politics and reality of a limited budget that cannot be stretched far enough around the table.

III. RIDING A THIN LINE BETWEEN THE COURTS AND POLITICS

Arguably the toughest task for a court reviewing agency action is striking the balance between affording deference while assuring the agency is fulfilling obligations enacted by Congress.

⁶⁰ H.R. CONF. REP. 97-835 (1982).

⁶¹ See 16 U.S.C. § 1533(b)(3)(C)(ii).

⁶² 2013 Candidate Notice of Review, 78 Fed. Reg. 70,104 (Nov. 22, 2013).

⁶³ U.S. Fish and Wildlife Serv., Species Assessment and Listing Priority Assignment Form for the Greater Sage Grouse, Columbia Basin Distinct Population Segment (June, 2007), <http://www.fs.fed.us/r6/sfpnw/issssp/documents/planning-docs/cp-fws-candidate-bi-centrocercus-urophasianus-2007-06.pdf>.

⁶⁴ KRISTINA ALEXANDER, CONG. RESEARCH SERV., R41100, WARRANTED BUT PRECLUDED: WHAT THAT MEANS UNDER THE ENDANGERED SPECIES ACT 6 (2014).

⁶⁵ See Smith, *supra* note 58, at 132.

It is a thin line between both realms and no different in the context of reviewing listing decisions. Administration changes are a regular occurrence in today's political world and this surely has an impact on how the Section 4 listing process is applied. The emerging tendency of increased critical habitat exclusions shows reliance on efforts is not limited to contexts of listing species. Energy development in areas with candidate and WBP species has created a legal form of the Bermuda Triangle where energy law, wildlife law, and administrative law collide.

B. Applicable Standards of Review

The Administrative Procedure Act (APA) is the single most important statute of administrative law.⁶⁶ Within it are rules and procedures for agencies to follow in adjudicatory proceedings, rulemaking hearings, and tests for whether a particular plaintiff has standing to bring suit. The APA also includes the applicable standards of judicial review for "final" agency action.⁶⁷ Decisions by FWS or NMFS are reviewable by courts using the arbitrary and capricious standard.⁶⁸ Review courts have found FWS arbitrary and capricious in instances where the agency does not explain a rational connection between the facts and decision made, relied on factors Congress did not intend, or failed to consider an important aspect of a problem.⁶⁹

⁶⁶ 5 U.S.C. §§ 500–596, 701–707.

⁶⁷ See 5 U.S.C. § 704.

⁶⁸ See *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 686 (D.C. Cir. 1982) ("We conclude therefore that the appropriate standard of review under the ESA is the arbitrary and capricious standard provided by the APA.").

⁶⁹ See, e.g., *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011); *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 274 Fed. Appx. 542 (9th Cir. 2008); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010); *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89 (D. D.C. 2010); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929 (D. Or. 2007); *Moden v. U.S. Fish and Wildlife Serv.*, 281 F. Supp. 2d 1193 (D. Or. 2003); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D. D.C. 1997).

Two main instances exist where agencies are found arbitrary and capricious: (1) situations involving fact interpretation; and (2) circumstances involving discretionary judgments. On the fact interpretation issue, most courts defer to agency decisions if evidence in the record is supported by the outside scientific community.⁷⁰ Likewise, many courts also defer to an agency's discretion when its decision can be logically traced to the evidence on record.⁷¹ Conversely, courts are more likely to find an agency action unreasonable in fact interpretation issues involving FWS's use of heavily criticized methods or its reliance on facts not supported by data.⁷²

Discretionary judgments by agency personnel are upheld as legitimate more often than fact interpretation challenges. Courts are prevented from substituting their own judgment in place of agencies.⁷³ Accordingly, discretionary choices, such as “the best science available,” the number of facts considered in listing decisions, and agency methods are seldom overturned under the arbitrary and capricious standard.⁷⁴

To better evaluate conservation efforts in listing cases, courts should apply the arbitrary and capricious definition set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.* “An agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it—for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise.”⁷⁵ The language “*reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise*” is

⁷⁰ See *Home Builders Ass'n v. U.S. Fish and Wildlife Serv.*, 529 F. Supp. 2d 1110 (N.D. Cal. 2007).

⁷¹ See *Am. Wildlands v. Kempthorne*, 478 F. Supp. 2d 92 (D.C. 2007).

⁷² See *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929 (D. Or. 2007).

⁷³ See 5 U.S.C. § 706(2)(A); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

⁷⁴ See *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835 (9th Cir. 2003).

⁷⁵ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

arguably the best place courts can go to review conservation efforts and practices in listing determination cases.⁷⁶ The foregoing standard would allow courts to review FWS's use of conservation efforts to not list, designation of an arbitrary LPN, or habitat exclusion based on a management plan without depriving the Agency of necessary deference. A court could assess how FWS interprets the immediacy and magnitude of a threat in a WBP designation by directly reviewing the inclusion of conservation efforts and judge how much influence the effort carried in the perception of the threat to the species at issue. Moreover, a conservation practice shown to be sub-par in terms of success would have the best chance of surviving any type of discretion argument made by the agency under the above language of *State Farm*.

C. The Danger of Political Judgments' Effect on Listing Decisions

Political pressure in any agency action is a sure-fire thing. When does this type of pressure affect listing determinations to the point where species' potential survival is compromised? More importantly, when do conservation efforts become politically charged in a listing decision or LPG analysis? The text of the ESA is riddled with avenues for political judgments to take hold disguised as unbiased scientific conclusions based on the "expertise" the agency is expected to employ. For example, the Section 4(a) factors may have a scientific sound---curtailment of habitat, disease, and predation—but any of these terms may be twisted to the Secretary's preference.⁷⁷ FWS personnel are free to choose what exactly constitutes "threatened destruction" of a species' range or "modification of habitat," and courts lack the appropriate tools to combat this.

From a theoretical standpoint, the factors sound scientific and seem relatively easy for a Secretary to consider when making a listing decision. In practice, the deference afforded to how the

⁷⁶ See *id.*

⁷⁷ See generally 16 U.S.C. § 1533(a)(1)(A)–(E) (containing terms allowing for broad agency discretion).

factors are balanced, interpreted, and used is complicated. Political judgments take hold when FWS is required to take into account efforts by States or political subdivisions to protect a target species.⁷⁸ This language affirms the already political nature of Section 4 and establishes the perfect environment for the agency to determine how much of a State's effort warrants a negative listing or finding of no jeopardy. Being political appointees, heads of state agencies and FWS have the ability to curtail the "science" behind an effort to provide a favorable outcome for a particular administration or industry.

Although the "best scientific information" mandate language is present, the requirement has been a hotly contested issue as to what the phrase really means and how it affects the listing process because no other factors may be considered.⁷⁹ On one hand, science can demonstrate how the life expectancy and generation interval of a species affect its susceptibility to extinction. However, science cannot display the acceptable level of extinction risks or how risks can be measured.

D. Judicial Variability in Application of Conservation Practices

Federal courts have taken divergent approaches to their review of conservation efforts as reasons for the services not to list. Since judges are political appointees, they are perhaps no less likely to act on personal views regarding listing determinations than any other official.⁸⁰ But their individual predispositions lead them to author binding legal opinions that often cannot be squared with the statute's text or the Agency's superior authority to administer the

⁷⁸ See 16 U.S.C. § 1533(b)(1)(A).

⁷⁹ See *id.*

⁸⁰ See U.S. CONST. art. 2, § 2, cl. 2 ("The President shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

statute.⁸¹ The Ninth Circuit's wavering jurisprudence on 4(b)(1)'s interpretation exemplifies this turbulence.⁸²

E. Deferring to State and Local Management Plans Is Not the Answer

Collaboration between FWS and various federal agencies, as well as state-level conservation plans has increased in recent years. Collaboration can be better termed as "reliance" by FWS on conservation efforts by the above entities to not list species under the ESA. Judicial review has been leery of the use of conservation agreements as a basis not to list; however, a lack of uniformity in case outcomes has left this topic open for debate.⁸³ This issue is present on two main levels: (1) reliance on other federal agencies; and (2) reliance on state conservation plans.⁸⁴

FWS reliance on actions of other federal agencies has drawn criticism from review courts when reliance primarily pertains to future action. For example, in *Friends of the Wild Swan v. U.S. Fish and Wildlife Service*, the United States District Court for the District of Oregon found FWS's decision not to list the bull trout as endangered was arbitrary and capricious, primarily because the Service had relied upon future management changes the National Forest Service would put into effect to help conserve the species.⁸⁵ In its decision, the court focused on the language of Section 4 and surmised that "existing regulatory mechanisms" must be considered

⁸¹ See *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001); *W. Watersheds Project v. Foss*, No. CV 04-168-MHW, 2005 WL 2002473 (D. Idaho Aug. 9, 2005); *Friends of the Wild Swan v. United States*, 945 F. Supp. 1388 (D. Or. 1996).

⁸² See cases cited *supra* note 82.

⁸³ See cases cited *supra* note 82.

⁸⁴ See Uchitel, *supra* note 27 at 245–50 (discussing the relationship of FWS reliance on conservation efforts with other federal agencies and the collaboration of FWS with state government conservation measures in listing contexts). The argument presented conveys case law on both levels suggesting reliance on such plans cannot "support a lawful basis for deciding whether to list a declining species." See *id.*

⁸⁵ *Friends of the Wild Swan v. U.S. Fish and Wildlife Serv.*, 945 F. Supp. 1388, 1398 (D. Or. 1996).

only when they have proven successful.⁸⁶ Additionally, the court also focused on the Agency's reliance on the trout's wide range as reason to view the threat to the bull trout as only moderate, despite FWS's concurrent finding that isolated subpopulations and loss of migratory avenues formed a heightened extinction possibility.⁸⁷

Deference to "third party" plans sounds like an appealing choice for FWS to employ, especially in light of the stated Congressional policies and purposes in the Act.⁸⁸ It sounds attractive for the Service to focus on other species of higher need, knowing states and local municipalities are implementing conservation agreements voluntarily. Nevertheless, FWS must directly provide for those species most at-risk. Reliance on state and local plans hinge on notions those agreements will actually be implemented and conform to FWS responsibilities.

IV. EXCLUSIONS FROM CRITICAL HABITAT

Exclusions from critical habitat and critical habitat designations (CHD) have been some of the most controversial discussions involving listing determinations, especially in instances where conservation effort reliance intersects with determinations of critical habitat. The ESA expressly provides for the Secretary to establish critical habitat to "the maximum extent prudent and determinable" for a species once listed as endangered or threatened.⁸⁹ Section 1532(5)(A) defines "critical habitat" to include areas that species occupy and also areas outside the geographical

⁸⁶ *See id.* at 1397–98.

⁸⁷ *See id.*

⁸⁸ *See* 16 U.S.C. §1531(a)(5) (stating encouragement of "the States and other interested parties . . . to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants"); *see also* § 1531(c) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.").

⁸⁹ 16 U.S.C. § 1533(a)(3)(A)(i).

area if essential to the species' conservation.⁹⁰ Determining whether a species uses an area with sufficient regularity to show occupancy is highly fact intensive and contextual. In *Arizona Cattle Growers' Association v. Salazar*, the Ninth Circuit determined the following factors relevant to the above inquiry: (1) how often the area is used by the species; (2) how the species uses the area; (3) the area's necessity for species' conservation; and (4) the area's degree of use for migration and mobility purposes.⁹¹ Although the questions are within the purview of FWS, the determinations are entitled to standard deference by a court.

Defining what "critical habitat" is for a species is a challenge FWS faces regularly. Section 4(b) contains a provision allowing the Secretary to exclude areas from critical habitat "if such exclusion outweigh the benefits of specifying such area as part of the critical habitat."⁹² The provision requires the Secretary to consider economic impacts of a possible designation while also allowing her to exclude habitat unless such exclusion would lead to extinction.⁹³ Simply put, the Secretary is tasked with performing a cost-benefit balancing test based on the "best scientific and commercial data available."⁹⁴ Because of the vagueness surrounding the meaning of "best scientific and commercial data available," CHDs happen to be some of the most politically charged and contested decisions in the entire listing process. The ESA states exclusions are allowed based on economic impacts, national security concerns, *or any other relevant impact*.⁹⁵ Conservation efforts impact would most appropriately fall into the reasoning of exclusion decisions under the "other relevant impact" language.

Litigation surrounding CHD and exclusions from critical habitat has expanded since the landmark case of *Northern Spotted Owl v. Hodel*.⁹⁶ Courts have found the Service arbitrary and capricious

⁹⁰ See 16 U.S.C. § 1532(a)(5)(A)(i)–(ii).

⁹¹ *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2009).

⁹² 16 U.S.C. § 1533(b)(2).

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ *Id.*

⁹⁶ See *Ne. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988) (finding

in many instances where a CHD was offset by conservation efforts. For example, in *National Wildlife Federation v. National Marine Fisheries Service*, the Ninth Circuit held NMFS inadequately analyzed economic impacts on the recovery value of critical habitat for three listed salmon species by excluding life cycles and migration patterns from short term effects considerations.⁹⁷

Similarly, in *Center for Biological Diversity v. Bureau of Land Management*, the United States District Court for the Northern District of California concluded FWS acted unreasonably by relying upon a mitigation plan for determining degradation to Pierson's milk vetch habitat. Specifically, the court ruled that the implementation of a mitigation management plan for the habitat was irrational because the plan required 50% of the population to decline before mitigation could commence.⁹⁸ Furthermore, in *Natural Resources Defense Council v. U.S. Department of Interior*, the Ninth Circuit ruled FWS acted arbitrarily and capriciously in assuming a state habitat management plan would be just as beneficial for a gnatcatcher songbird as would designation of critical habitat.⁹⁹

Nonetheless, review courts have allowed critical habitat exclusions in various contexts involving conservation practice reliance. In *Center for Biological Diversity v. Salazar*, the United States District Court for the District of Columbia considered whether exclusion of critical habitat for the Cape Sable seaside sparrow was reasonable.¹⁰⁰ The court allowed the exclusion because

FWS arbitrary and capricious in not listing the Northern Spotted Owl as endangered or threatened, even though expert testimony from the agency and independent sources urged that the logging industry in old-growth forests, habitat preferred by the owl, was having a detrimental impact on the species leading toward extinction).

⁹⁷ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1224–27 (9th Cir. 2007).

⁹⁸ *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1131–33 (N.D. Cal. 2006).

⁹⁹ *Natural Res. Defense Council v. U.S. Dep't of Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997) (finding no evidence existed to support assumption that conservation effort would alleviate threats more appropriately than a CHD).

¹⁰⁰ *Ctr. for Biological Diversity v. Salazar*, 770 F. Supp. 2d 68 (D.C. 2011) (holding the benefits of exclusion outweighed inclusion because a greater number of

a credible conservation effort (“CERP”) to restore parts of the Everglades was already in effect. Additionally, designating the area in question as critical habitat for the bird would prove incompatible with the goals of CERP, which focused on hydrologic conditions and vegetation mimicking such conditions existing before human hydrologic manipulation.¹⁰¹ Moreover, CERP’s success had already been demonstrated for other species, and an inclusion of land for critical habitat would create a negative impact on local tribal lands susceptible to flooding.¹⁰²

Likewise, in *Center for Biological Diversity v. Norton*, the United States District Court for the District of Arizona allowed exclusion of critical habitat for the Mexican spotted owl on tribal land.¹⁰³ The court surmised FWS’s exclusion of critical habitat on tribal land was reasonable because the benefit of maintaining a good, working relationship with the San Carlos Apache tribe outweighed any benefit to the owl possibly resulting from the land’s inclusion as critical habitat.¹⁰⁴ Additionally, the tribe was simultaneously pursuing a natural resource protection program of its own for the owl at the time of FWS’s decision to exclude the critical habitat.

Furthermore, in *Arizona Cattle Growers’ Association v. Salazar*, the Ninth Circuit held FWS properly relied upon Mexican Owl’s low population densities and marginal habitat quality in deciding to exclude areas from critical habitat where few or no Mexican owls were known to be.¹⁰⁵ Similarly, in *Maddalena v. U.S. Fish and Wildlife Service*, the United States District Court for the Southern District of California upheld FWS’s exclusion of critical habitat based on its consideration of management challenges regarding off road vehicles.¹⁰⁶ Critical habitat designations are

other endangered species would be benefited by the CERP plan in the longer run and exclusion supported multi-stakeholder restoration processes).

¹⁰¹ See *id.* at 85.

¹⁰² See *id.* at 79–83.

¹⁰³ *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003).

¹⁰⁴ See *id.* at 1105–07.

¹⁰⁵ *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2009) (holding known owl sites in the area were widely scattered and dispersed from one another).

¹⁰⁶ *Maddalena v. U.S. Fish and Wildlife Serv.*, No. 08-CV-02292-H (AJB), 2010

intended for species *recovery*, not to maintain current population levels. FWS admits agency resources could be better spent on listing more species, as opposed to designating critical habitat for already listed species.¹⁰⁷ Moreover, FWS asserts the cost of designating critical habitat in response to court orders “now consumes nearly the entire listing program budget.”¹⁰⁸

A. Sage Grouse v. Energy Development: Tradeoffs That Will Result

Taking into account conservation efforts, listing designations, and critical habitat exclusions, energy development in the United States has played a role in how potential endangered or threatened species are treated. One of the best examples of this issue is the greater sage grouse in the western U.S.

The greater sage grouse (sage grouse) is a ground-dwelling bird with long pointed tail feathers and a well-known mating ritual referred to as lekking.¹⁰⁹ Much of the bird’s habitat has been impacted by agricultural uses, as well as oil and gas development.¹¹⁰

In Wyoming, much discussion has centered on the state’s decision to continue natural gas development within areas considered crucial sage grouse habitat. Much of the scrutiny has targeted the conservation agreement Wyoming developed to conserve the bird (“Wyoming Core Strategy”) and various other agreements it has

WL 9915002, at *11 (holding FWS’s properly decided to analyze two management areas as a single unit and exclude them from its CHD because closure of one area would affect another, even though ORV users did not recreate at one of areas).

¹⁰⁷ See *Hearing on H.R. 2933 Before the H. Res. Comm.*, 108th Cong. (Apr. 28, 2004) (statement of Craig Manson, Assistant Sec’y for Fish & Wildlife and Parks, Dep’t of the Interior), available at <http://www.fws.gov/laws/Testimony/108th/2004/MansonCHHR2933.html>.

¹⁰⁸ See *id.*

¹⁰⁹ *Basic Facts About Sage-Grouse*, DEFENDERS OF WILDLIFE (2013), <http://www.defenders.org/sage-grouse/basic-facts> (last visited May 2, 2014) (stating grouse’s heavy reliance on various types of sagebrush for food and shelter, the need for large swaths of sagebrush land make the bird a good candidate for listing under the ESA).

¹¹⁰ See *id.* (the species was determined to be WBP in 2010 by FWS).

entered into with natural gas companies.¹¹¹ Despite the existence of Wyoming's Core Area Strategy, which began implementation in 2008, FWS identified the lack of sufficient regulatory mechanisms to conserve sage grouse and their habitat as a primary threat leading to their WBP finding in 2010.¹¹² A central issue for the sage grouse's conservation is Wyoming's revision of the Core Strategy Plan to allow increased placement of natural gas well-pads within the core area, thereby eliminating more lek and sagebrush habitat for the bird.¹¹³ Because sage grouse are not endangered, no critical habitat protections exist. Conservation of habitat for the species is primarily reliant on State efforts and the core area management plan. More recently, the Bureau of Land Management (BLM) has come under fire for including core grouse areas in potential lease sales for oil and gas development on 115,000 acres of federal land across Wyoming.¹¹⁴

Tradeoffs continue to result in this type of situation for FWS. On one end of the scale is a duty to protect at-risk species not listed under the ESA as of yet. On the other end is a federalism argument, where states are free to choose how conservation measures will be implemented, while attempting to balance the need for new energy sources. FWS is aware of declining grouse numbers, and it knows Wyoming's conservation strategy has faltered; yet FWS remains unable to utilize the ESA's power because of the bird's WBP designation. If the bird was listed, Wyoming's natural gas industry would almost assuredly be crippled. Any area deemed critical habitat for the grouse would be restricted from further development of any kind. These types of tradeoffs will only increase with other species in areas of high energy interest throughout the country.

¹¹¹ Erik Molvar, *Douglas Core Area Petition*, WILDEARTH GUARDIANS 7, 15 (Oct. 24, 2013), http://www.wildearthguardians.org/site/DocServer/Douglas_Core_APA_petition_final.pdf?docID=11102 (last visited Apr. 22, 2015).

¹¹² *Id.* at 2–3, 11.

¹¹³ *Id.*

¹¹⁴ See Scott Streater, *BLM lease sale in Wyo. Sparks sage grouse concerns*, E&E PUBLISHING, LLC (Feb. 18, 2015), <http://www.eenews.net/greenwire/2015/02/18/stories/1060013629> (last visited Mar. 2, 2015).

CHDs and voluntary conservation agreements between private landowners have been common tools utilized by FWS to further conserve habitat essential for a species without listing the species. Agreements allow landowners to continue using their own land, preferably without any restriction by the government that would result from a listing. Additionally, a recent federal report surmised that listing of the sage grouse could impede voluntary partnerships with ranchers and other landowners viewed as key to restoring the bird and its dwindling habitat.¹¹⁵ FWS, in fall 2013, proposed listing as threatened for a unique population of sage grouse found only in two states known as the Mono Basin population.¹¹⁶ Since that proposal, “landowner interest has declined precipitously.”¹¹⁷ Colorado Governor John Hickenlooper expressed this concern, in particular about his belief that states and partnerships with private landowners will be enough to save the sage grouse. The Governor wrote a letter to the Bureau of Land Management (BLM) asserting a proposed BLM plan for managing 1.6 million acres of federal land with grouse habitat in northwest Colorado does not properly balance existing land uses such as energy development and ranching with species conservation.¹¹⁸

While more than half of the remaining sage grouse habitat is located on federal land, more than 30% is found on private lands.¹¹⁹ After the proposed listing of the Mono Basin population in 2013, many

¹¹⁵ Letter from Jason Weller, Chief, U.S. Dep’t of Agriculture Natural Res. Conservation Serv., to Hon. John Hickenlooper, Governor, State of Colo. (Apr. 25, 2014), *available at* http://www.eenews.net/assets/2014/04/29/document_gw_01.pdf. (last visited May 3rd, 2014) (stating that more than \$350 million has been invested since 2010 in voluntary projects with private landowners and other partners to protect sage grouse and its habitat).

¹¹⁶ Proposed Rule to List Distinct Population Segment of Greater Sage-Grouse as Threatened, 78 Fed. Reg. 64358 (Oct. 28, 2013).

¹¹⁷ *Id.* (“While several factors likely influence landowner participation, it appears this decline is associated with the FWS proposal to list the bird in the fall of 2013.”).

¹¹⁸ *Id.*

¹¹⁹ Phil Taylor, *Public-private habitat ventures at risk as FWS weighs listing for sage grouse*, GREENWIRE (May 8, 2014), <http://www.eenews.net/stories/1059999245> (last visited May 15, 2014) (stating over 950 ranches have enacted voluntary conservation practices covering an area of about 3.8 million acres).

ranchers who had enacted conservation measures became deterred in continuing efforts mainly because those individuals felt like their efforts were not enough for FWS to negatively list the bird.¹²⁰ More recently, a rider in the FY'15 Omnibus Bill aims to prevent FWS from issuing any further rules pertaining to sage grouse, certainly impeding any progress involving voluntary landowner conservation efforts and continued ranching activities.¹²¹ Similar arguments about conservation efforts have occurred regarding the lesser prairie chicken, whose status is very similar to the sage grouse.¹²² Predicting the relationship between listing and conservation agreement use will be crucial toward sage grouse recovery and act as a template for other species of concern in the immediate future.

V. WHY CRITERIA ARE NEEDED NOW

Criteria for judicial review of listing decisions concerning conservation efforts is in dire need. The arbitrary and capricious review standard has not been stated in any particularity, resulting in substantial inconsistency by courts studying listing decisions and critical habitat designations. Most cases are fact sensitive and can be time-consuming for courts. Furthermore, factors or criteria would be valuable to utilize, where educational backgrounds in biological sciences are rare for those on the bench. Criteria will clarify decisions by FWS; focusing on furthering the stated purposes and policies of the ESA. In addition, criteria will provide necessary room to keep a check on agency action while affording deference. A solution to

¹²⁰ *See id.*

¹²¹ *See* Press Release, Sally Jewell, Sec'y of Interior, Dep't of Interior, Statement by Interior Secretary Sally Jewell on the Sage-Grouse Rider in the FY15 Omnibus Bill, (Dec. 17, 2014), *available at* <http://www.doi.gov/news/pressreleases/statement-by-interior-secretary-sally-jewell-on-the-sage-grouse-rider-in-the-fy15-omnibus-bill.cfm> (last visited Jan. 16, 2015).

¹²² Nick Snow, *FWS lists lesser prairie chicken as threatened species*, OIL AND GAS JOURNAL, (Mar. 28, 2014), <http://www.ogj.com/articles/2014/03/fws-lists-lesser-prairie-chicken-as-threatened-species.html> (stating the decision "will let Kansas, Oklahoma, Texas, New Mexico, and Colorado continue managing conservation efforts and avoid further federal regulation of oil and gas, utility line maintenance, and other activities under the . . . range-wide conservation plan").

the question of how “judges are judging” will provide consistency, reduce expensive litigation, and preserve the bite the ESA is meant to have.

A. Consistency Across the Country and the Agency Is a Win-Win

First, review criteria applied to conservation efforts will offer much-needed consistency for listing decisions across the country. A standard set of factors for courts to use will be universal and uniform. This uniformity can build upon itself, so in time FWS will have a better sense of how courts will rule when faced with a challenged effort reliance. In addition, having criteria will allow courts to set precedents on what is acceptable for FWS to rely on in a conservation reliance context—whether it be how much a conservation agreement comes into play for a troubled species or the effectiveness of voluntary state management plans. Once uniformity is created, FWS will likely be able to administer the ESA more smoothly and further FWS’s policy of employing conservation practices.

B. Funding Critical Habitat Designations, NOT Litigation

Until Congress provides appropriate funding for the task of recovering large numbers of at-risk species, most of the budget FWS uses for listing and critical habitat designations will be spent elsewhere: in litigation challenging listing determinations. There is likely no other program in the country with such a large disparity between the goals of Congress and the resources made available to achieve those goals. FWS has admitted in many cases that funds are not available for habitat restoration or preservation because of the sheer number of suits the Agency defends regarding listing.¹²³

Review criteria can remedy this issue and allow the Agency to spend funds more appropriately. Litigation is an expensive endeavor and developing consistency in decision-making by

¹²³ See generally *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006)

courts can save time and money. FWS, with the hope of decreased challenges to the Agency's actions, will have the opportunity to use the "ESA" budget more appropriately with an increased addition of species to the list and improved critical habitat designations. Efficiently using conservation efforts with landowners can be the economic breakthrough the agency has waited for. Making these two aspects more realistic for the Agency to employ preserves the ESA's legitimacy, while also allowing the Agency to continue conservation effort utilization.

C. Preserving the Bite the Endangered Species Act Is Meant to Have

The ESA, signed into law by President Nixon, was meant to be one of the most powerful and sweeping pieces of legislation ever created to protect at-risk species.¹²⁴ However, the ESA's influence has faltered in recent years with increased conservation agreement reliance, growth in the number of WBP designations, and political interruption of Agency decision-making.

As mentioned, consistency and better utilization of funds are benefits of criteria for conservation effort review. Likewise, judges will be better equipped to differentiate between legitimate agency action and political clout. Criteria have the ability to initiate earlier action before a species reaches the point where recovery probabilities are null. Developing regulatory mechanisms that prove successful before a listing decision will be advantageous in two ways: (1) if a negative listing is chosen, FWS has the proof to support its decision by showing a successful conservation strategy is already in place; and (2) at-risk species will be managed at much earlier stages, thereby increasing their odds of overall recovery.

¹²⁴ Richard M. Nixon, Special Message to the Congress Outlining the 1972 Environmental Program (Feb. 8, 1972), *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD M. NIXON, 1972, at 173-89.

VI. THE “NEW” ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW

The criteria proposed are primarily factors for judges to consider when reviewing conservation efforts in listing decisions. The Agency’s increasing reliance on these types of efforts over time since the Babbitt era has created a per se “6th listing factor” under Section 4. Even though FWS is limited to listing considerations under Section 4(a)(1), the Agency’s reliance on conservation efforts and practices has played an increasingly prominent role in deciding whether species should be listed. That being said, the judiciary must be equipped appropriately moving forward.

Criteria 1: State Farm’s Language Is the Base of Review Analysis

The key is figuring out how “judges are really judging” and interpreting threats to species without substituting their own judgment for that of the Agency. *State Farm* offers a great foundation for the review standard pertaining to the use of conservation efforts.¹²⁵ Judges should begin analysis pertaining to effort reliance by FWS by examining whether the Agency “[r]eached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise.” Reviewing efforts under this language does two things: (1) it preserves the balance between agency deference and review; and (2) it provides courts with a mechanism to cross-step “agency expertise” when conservation efforts do not show a measurable benefit to an at-risk species. A court can assess whether conservation efforts have a beneficial effect for a species, either evaluating how positive the species reacts to the efforts or whether the population is shown to have any growth because of the effort. If none is present or minimal at best, the burden of the Service to persuade and prove to a review court why conservation efforts are preferred increases greatly.

¹²⁵ See generally *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

Criteria 2: Finding a Direct Link between Conservation Efforts and Threats Is Fundamental

The second criteria for conservation effort review is to find a direct “link” between a perceived threat to a species and conservation efforts to alleviate the threat. The judiciary needs to find an effort relied upon by FWS that actually targets the threat to a particular species head-on and in fact reduces that threat. As in the sage grouse discussion, expansion of natural gas development seems to be the main threat to the continued survival of the bird as habitat suitable for the species continues to decline. To target this threat directly, conservation efforts could limit where gas pads are to be located or place restrictions on where companies may lease land. Reworking lease plans and allowing exceptions to setback requirements, as what is being done in Wyoming, may “address” the threat to the bird, but it does not materially help the species because habitat continues to be compromised.

Finding a link between threats and efforts would also be pertinent in contexts of WBP designations and application of the LPG’s enacted by FWS. FWS assesses conservation efforts constantly when reviewing a species for a WBP designation, especially while performing the two-part analysis in reaching a LPN. Assessing the “threat” to a species is very important, not because of the “imminent” and “not imminent” choices the guidelines offer; but because conservation efforts are central in determining how damaging a threat is to a species. Direct linkage is a tool that courts can employ, and evidence of the link showing considerable benefits of efforts alleviating threats falls on the Service to provide. Furthermore, this link conforms with the arbitrary and capricious standard’s language requiring a “rational connection between facts and the choice made by the agency.” Amounting to a sort of “check” by the court on agency action in these types of designations, the Agency is free to choose the science and data supporting the conservation effort, but a link showing measurable benefit would improve the review process currently in place.

Criteria 3: Precedents on Using Conservation Efforts Shed Light for the Future

Precedents governing states' use of conservation plans and subdivisions as a "6th" factor in Section 4 may shed light into their application in the future. Most cases assessing effort reliance come from the Ninth Circuit.¹²⁶ The Circuit has concluded in most instances that reliance on plans that guide future action is not a valid reason to avoid listing a species under the ESA.¹²⁷ The Tenth Circuit has also reached a similar conclusion.¹²⁸ The direction courts have moved seems to show the need for some sort of success from the conservation efforts to uphold agency reliance. Judges may take a harder look at the success of pre-listing efforts to ensure any fragmentation or reduction in potential critical habitat is counter-balanced by a successful conservation practice for a species. In the Midwest and Northeast, where natural gas development through the use of hydraulic fracturing is beginning to surge, courts should consider efforts' effectiveness in compensating for the diminished acreage available in the distant future. Moreover, an effort's proven success ensures energy development can continue while conservation of at-risk species is appropriately handled. Fundamentally, judges could benefit by incorporating the Ninth and Tenth Circuits' precedents concerning the suggested "link" factor and *State Farm* language.

VII. CONCLUSION

It is undeniable the ESA is broken. Beginning to preserve the legitimacy and legacy associated is a tough task. Starting with establishing review standard criteria for conservation efforts is a good first step in applying the Act as it should be. Listing decisions and critical habitat exclusions have increasingly incorporated the use of conservation practices as a means to assess species' status to the point where agency reliance on these measures seems to be a

¹²⁶ See *supra* notes 36–60 and accompanying text.

¹²⁷ See *id.*

¹²⁸ *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004).

primary factor in the decision itself. Courts must assert appropriate review of this trend to adequately check the actions of FWS, bring species with highest priority to the forefront of ESA application, and establish precedent toward future use of practices in listing contexts. The budget of the Agency is not large enough to handle the increasing burden of at-risk species management; but, the reliance on conservation efforts by other agencies, states, and subdivisions may hurt more species than it helps if not appropriately administered.

Moving forward, the way “judges judge” the use of conservation practices will be critically important toward maintaining adequacy of the ESA and molding how FWS continues to develop this method. Continuing to lose species diminishes the nation’s heritage, but continuing to rely on measures that diverge from adequate protection and management of those species is the lynchpin in the wheel axle of diminished biodiversity. Beginning the process of adequately reviewing effort reliance can appropriately describe how this policy can be administered efficiently and thoroughly in years to come.